Tumasek Beckmann Cutlery Sdn Bhd v Bromma (M) Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22–126 OF 2006
VT SINGHAM J
16 MAY 2008

Civil Procedure — Striking out — Statement of claim — Application for summary disposal — Whether could be summarily disposed — Whether claim obviously unsustainable — Whether abuse of process of the court — Whether court's interference justified

The defendant filed an application to strike out the plaintiff's writ and statement of claim, or alternatively to strike out the reliefs prayed for in para 20(i), (ii) and (iii) under O 18 r 19(a), (b) or (d) of the Rules of the High Court 1980 ('RHC'). The learned senior assistant registrar ('SAR') who had disallowed prayer 1 of the application however had granted the alternative prayers. The plaintiff who was dissatisfied with the order of the learned SAR had appealed to set aside the said order. The plaintiff's claim against the defendant was grounded upon a sale and purchase agreement purportedly entered by the plaintiff and the defendant for the purchase of the industrial lands which was conditional upon the fulfillment of certain condition precedent. The plaintiff contended that the vacant possession of the said lands had not been delivered to the defendant when the defendant was alleged to have trespassed into the said land, as the condition precedent had not been fulfilled and the balance purchase price had not been paid and therefore claimed for rental and damages. However, the defendant in support of its application to strike out the plaintiff's claim, contended that it did not take vacant possession of the land but merely mobilised the building equipments on the said lands on the expectation that the said agreement would be completed within three months from the date of the said agreement and thereafter to commence the construction thereof the soonest possible. Thus the defendant contended that it did not commit any breach of the terms of the said agreement and the plaintiff's claim for damages was wrongful and premature. In reply, the plaintiff contended that although the defendant had denied trespass, they had admitted intrusion and occupation of the plaintiff's land prior to the completion of the said agreement.

Held, allowing the appeal with costs:

(1) Summary process is inappropriate where the facts and the issues raised are in dispute and ought to be determined through cross examination of witnesses, or it requires serious argument. The reliefs claimed in para 20(i), (ii) and (iii) of the statement of claim were matters to be proved and determined at the trial and not by way of summary procedure or to be disposed of summarily. It was for the plaintiff to establish the claims at the trial and ought not to be shut out from adducing evidence to establish the claims (see paras 16 & 18).

(2) The reliefs claimed in the instant case were not matters which were obviously unsustainable or the claim was plainly or evidently unjust in law or a sham or had no substance to be struck out or to be decided summarily. Since the learned SAR had dismissed the defendant's application to strike out the plaintiff's writ of summons and statement of claim, the plaintiff's claim under the reliefs prayed in para 20(i), (ii) and (iii) of the statement of claim should therefore be set down for hearing however slight the chances were of succeeding (see para 17).

(3) In the instant case, the facts and the circumstances were such that the court would be justified in interfering with the discretion exercised by the learned SAR in striking out the reliefs claimed by the plaintiff as they were not hopeless or baseless or without foundation in law or equity or it was an abuse of the process of the court (see para 20).

(4) However, the court was satisfied that the facts of the present case was not a case where the process of the court had been abused or the reliefs prayed for in para 20(i) and (ii) of the statement of claim was used not to remedy a genuine grievance or used as an instrument of oppression or was an abuse of legal machinery. Therefore, the plaintiff should be allowed to proceed to establish the reliefs at the trial as this was not a proper time or an application stage to consider the final submissions where the powers of the court was invoked to strike out the reliefs on the grounds, inter alia, that it was an abuse of the process of the court (see para 22).

(5) The defendant having admitted entering into the said lands could not contend that they had not taken vacant possession but merely mobilised the building equipments on the said lands and therefore it did not amount to trespass was misplaced in law and on the facts. The defendant was not permitted to approbate and reprobate and move the court to strike out the reliefs as prayed by the plaintiff in the statement of claim (see para 24).

(6) In the circumstances, the court found that this was not a suitable case for the issues raised by both parties to be decided on affidavit evidence. The court was also of the considered view that allowing the reliefs as in

para 20(i) and (ii) of the statement of claim to remain until the trial would not cause any hardship or injury to the defendant as it was still for the plaintiff to prove the reliefs as prayed (see paras 27–28).

[Bahasa Malaysia summary

Defendan telah memfailkan permohonan untuk membatalkan writ dan penyataan tuntutan plaintif, atau secara alternatif, untuk membatalkan relief-relief yang dipohon dalam perenggan 20(i), (ii) dan (iii) di bawah A 18 k 19(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Penolong kanan pendaftar ('PKP') yang bijaksana yang tidak membenarkan tuntutan 1 permohonan walau bagaimanapun telah membenarkan permohonan-permohonan alternatif. Plaintif yang berasa tidak puas hati dengan perintah PKP yang bijaksana telah merayu untuk membatalkan perintah tersebut. Tuntutan plaintif terhadap defendan adalah berasaskan perjanjian jual beli yang dikatakan telah dimasuki oleh plaintif dan defendan untuk membeli tanah-tanah berasingan dengan syarat pematuhan pra syarat tertentu. Plaintif menegaskan bahawa milikan kosong tanah-tanah tersebut tidak diserahkan kepada defendan semasa defendan dikatakan telah menceroboh ke dalam tanah tersebut, kerana pra syarat tidak dipatuhi dan baki harga belian tidak dibayar dan oleh itu menuntut sewa dan ganti rugi. Walau bagaimanapun, defendan dalam menyokong permohonannya untuk membatalkan tuntutan plaintif, menegaskan bahawa ia tidak mengambil milikan kosong tanah tersebut tetapi hanya mendapatkan peralatan-peralatan pembinaan ata tanah-tanah tersebut dengan menjangkakan bahawa perjanjian tersebut akan siap dalam tempoh tiga bulan daripada tarikh perjanjian tersebut dan berikutnya memulakan pembinaan secepat mungkin. Oleh itu defendan menegaskan bahawa ia tidak melakukan apa-apa pelanggaran terma-terma perjanjian tersebut dan tuntuan plaintif untuk ganti rugi adalah salah dan pra matang. Dalam jawapan, plaintif menegaskan bahawa meskipun defendan menafikan pencerobohan, mereka telah mengakui telah memasuki dan menduduki tanah plaintif sebelum siap perjanjian tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Proses terus tidak sesuai di mana fakta-fakta dan isu-isu yang ditimbulkan adalah dipertikaikan dan patut ditentukan melalui pemeriksaan balas saksi-saksi, atau ia memerlukan penghujahan serius. Relief-relief yang dituntut dalam perenggan 20(i), (ii) dan (iii) penyataan tuntutan merupakan perkara-perkara yang perlu dibuktikan dan ditentukan semasa perbicaraan dan bukan melalui prosedur terus atau diselesaikan terus. Adalah untuk plaintif membuktikan tuntutan-tuntutan semasa perbicaraan dan tidak patut mengelak

daripada mengemukakan keterangan untuk membuktikan tuntutan-tuntutan tersebut (lihat perenggan 16–18).

(2) Relief-relief yang dituntut dalam kes ini bukan perkara-perkara yang jelas tidak boleh dikekalkan atau tuntutan tersebut nyata dan jelas tidak adil dari sisi undang-undang atau pemalsuan atau tidak mempunyai asas untuk dibatalkan atau untuk diputuskan terus. Memandangkan PKP yang bijaksana telah menolak permohonan defendan untuk membatalkan writ saman dan penyataan tuntutan plaintif, tuntutan plaintif di bawah relief-relief yang dipohon dalam perenggan 20(i), (ii) dan (iii) penyataan tuntutan hendaklah dikemukakan semasa perbicaraan walaupun mempunyai peluang tipis untuk berjaya (lihat perenggan 17).

(3) Dalam kes ini, fakta dan keadaan adalah sedemikian sehinggakan mahkamah dijustifikasikan untuk campur tangan dengan budi bicara yang digunakan oleh PKP yang bijaksana dalam membatalkan relief-relief yang dituntut oleh plaintif kerana mereka bukan putus asa atau tanpa asas atau tiada asas undang-undang atau ekuiti atau ia adalah penyalahgunaan proses mahkamah (lihat perenggan 20).

(4) Walau bagaimanapun, mahkamah berpuas hati bahawa fakta kes ini bukan kes di mana proses mahkamah telah disalahgunakan atau atau relief-relief yang dipohon dalam perenggan 20(i) dan (ii) penyataan tuntutan digunakan bukan untuk meremedikan kilanan tulen atau digunakan sebagai alat penindasan atau adalah penyalahgunaan proses undang-undang. Oleh itu, plaintif patut dibenarkan untuk terus membuktikan relief-relief tersebut semasa perbicaraan kerana ini bukan masa yang wajar atau peringkat permohonan untuk mempertimbangkan penghujahan-penghujahan akhir di mana kuasa-kuasa mahkamah diberikan untuk membatalkan releif-relief tersebut atas alasan, antara lain, bahawa ia adalah penyalahgunaan proses mahkamah (lihat perenggan 22).

(5) Defendan yang mengakui telah memasuki tanah-tanah tersebut tidak boleh berhujah bahawa mereka tidak memperoleh milikan kosong tetapi hanya menyediakan peralatan pembinaan ke atas tanah-tanah tersebut dan oleh itu tidak membentuk pencerobohan telah disalahletak dari sisi undang-undang dan fakta. Defendan tidak dibenarkan untuk aprobat dan reprobat dan memohon mahkamah untuk membatalkan relief-relief atas alasan-alasan, antara lain, bahawa ia adalah penyalahgunaan proses mahkamah (lihat perenggan 24).

(6) Dalam keadaan berikut, mahkamah mendapati bahawa ini bukan kes yang sesuai untuk isu-isu yang ditimbulkan oleh oleh kedua-dua pihak untuk diputuskan berdasarkan keterangan afidavit. Mahkamah juga mempertimbangkan pendapat bahawa dengan membenarkan

relief-relief seperti dalam perenggan 20(i) dan (ii) penyataan tuntutan untuk kekal sehingga perbicaraan tidak akan menyebabkan sebarang kesukaran atau kerugian kepada defendan kerana plaintif masih perlu membuktikan relief-relief yang dipohon (lihat perenggan 27–28).] A

Notes B

For cases on striking out of statement of claim, 2(3) *Mallals' Digest* (4th Ed, 2007 Reissue) paras 6750–6786.

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417 (folld) C
Adib bin Mokhtar & Ors v Jason Chan Chee Keong & Anor [1999] 2 MLJ 473 (distd)
Attorney General of the Duchy of Lancaster v London & North Western Railway [1892] 3 Ch 274 (folld) D
Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (folld)
CC Ng & Brothers Sdn Bhd v Government of the State of Pahang [1985] 1 MLJ 347 (folld)
Castro v Murray [1875] 10 Ex 213 (refd) E
Charles Osenton & Co v Johnston [1942] AC 130 (refd)
Cheng Heng Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (distd)
Drummond-Jackson v British Medical Association [1970] 1 WLR 688 (folld)
Dyson v Attorney-General [1911] 1 KB 410 (folld) F
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212 (folld)
Estate of Lee Siew Kow, decd; Gan Eng Neo (W) & 2 Ors, In re the v Yeo Siew Neo (W) [1951] MLJ 224 (refd)
Goodson v Grierson [1908] 1 KB 761 (folld)
Golf Cheque Book Sdn Bhd, The & Anor v Nilai Springs Bhd [2006] 1 MLJ 554 (refd) G
Greenhalgh v Mallard [1947] 2 All ER 255 (folld)
HSBC Bank Malaysia Bhd v Dominance Timber Industries Holdings Sdn Bhd & Ors [2003] MLJU 307 (refd)
Harrison v Bottenheim (1878) 26 WR 362 (folld) H
Hazama Corp v KMS Builders Sdn Bhd & 2 Ors [2004] 2 AMR 62 (refd)
Hennell v Ranaboldo [1963] 1 WLR 1391 (folld)
Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498 (refd)
Hsu Seng v Chai Soi Fua [1990] 1 MLJ 300 (distd) I
Hubbuck & Sons v Wilkinson Heywood & Clark Ltd [1899] 1 QB 86 (folld)
Jacobs v Booth's Distillery Co (1901) 85 LT 262 (folld)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (folld)

A *Kemsley v Foot & Ors* [1951] 2 KB 34 (refd)
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors [1990] 3 MLJ 231 (folld)
King's Tanglin Shopping Pte Ltd v Chee Kim Neo [1991] 3 CLJ 1933 (refd)
Lee Nyan Choi v Voon Moon [1979] 2 MLJ 28 (refd)
B *Lim Kit Siang v Pemangku Ketua Polis Daerah Butterworth & Ors* [1988] 2 MLJ 648 (refd)
Malayan Banking Bhd v Gan Kong Yam [1972] 1 MLJ 32 (refd)
Metropolitan Bank v Polley [1855] (refd)
Moore v Lawson (1915) 31 TLR 418 (refd)
C *Nagle v Feilden* [1966] 2 QB 633 (refd)
News Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 (refd)
Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691 (distd)
D *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 (refd)
Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors [2002] 6 MLJ 20 (refd)
Pacific Internet Ltd v Catcha.Com Pte Ltd [2000] 3 SLR 26 (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resort Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1
E MLJ 162 (refd)
Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran [1986] 1 MLJ 418 (distd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)
F *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 (refd)
S Singaram v Fong Peck Moi & Anor [1976] 1 MLJ 237 (refd)
Saripah bte Manap & Ors v Emar Sdn Bhd (In Dissolution) & Ors [1998] 1 MLJ 323 (refd)
Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1994] 3 MLJ 530 (distd)
G *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607 (refd)
Stuart v Gladstone (1879) 10 Ch D 644 (refd)
Syarikat Kemajuan Kuari (M) Sdn Bhd v Su bin Abdullah & Anor [2003] 1
H MLJ 401 (distd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1989] 3 MLJ 177 (distd)
United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd
I [1983] 1 MLJ 206 (distd)
Ward v James [1966] 1 QB 273 (refd)
Wenlock v Moloney (1965) 1 WLR 1238 (refd)
William v Wilcox & Anor [1835–1842] All ER Rep 25 (refd)
Willis v Earl Beauchamp (1886) 11 PD 59 (refd)

Legislation referred to

National Land Code s 433B
Rules of the High Court 1980 O 18 r 19, O 18 r 19(a), O 18 r 19(b), O 18 r 19(c), O 18 r 19(d), O 92 r 4

Chandran Nair (Thevin Chandran & Associates) for the appellant/plaintiff.
Kok Li Shan (Henry Lim & Co) for the respondent/defendant.

VT Singham J:

[1] This is an appeal to the judge in chambers by the plaintiff against the decision of the learned senior assistant registrar, High Court Ipoh who had on 14 November 2006 allowed the application of the defendant, namely, prayer 2(a), (b) and (c) of the summons in chambers (encl 8) to strike out the *reliefs prayed* for in para 20(i), (ii) and (iii) of the plaintiff's statement of claim (encl 1) under O 18 r 19(a), (b) or (d) of the Rules of the High Court 1980 ('the RHC'). However, the learned senior assistant registrar had refused prayer 1 of the summons in chambers (encl 8) which was to strike out the writ of summons and statement of claim. The said application was grounded as disclosing no reasonable cause of action, scandalous, frivolous or vexatious and/or it is an abuse of the process of the court.

[2] By the said summons in chambers (encl 8), the defendant had applied for the following orders:

(1) Bahawa writ saman bertarikh 19 Jun 2006 dan penyata tuntutan bertarikh 14 Jun 2006 terhadap defendan dalam tindakan ini dibatalkan di bawah A 18 k 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau di bawah bidang kuasa sedia ada mahkamah di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980; atau

(2) Secara alternatif membatalkan tuntutan plaintif berikut secara disjunctive di bawah Aturan 18 K 19 (1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 dan/atau di bawah bidang kuasa sedia ada mahkamah di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980:

   (a) perenggan 20 (i) pernyataan tuntutan plaintif namely: *for the payment by the defendant of rental at RM20,000 or such reasonable sum a month from the date of occupation of the said Lands to the date of payment of the balance purchase price*;

   (b) perenggan 20 (ii) pernyataan tuntutan plaintif, namely: *general damages for breach of covenant(s) of the said Agreement' dan/atau*;

(c) perenggan 20 (iii) pernyataan tuntutan plaintif namely *an indemnity to reimburse all financial liability incurred by the plaintiff for any breach of any building bye-laws and legislation arising from the construction of the structures/factory on the said Lands*.

(3) Apa-apa relief lanjutan yang difikir suaimanfaat oleh mahkamah yang mulia ini;

(4) Bahawa kos permohonan ini dan kos sampingannya hendaklah dibayar oleh plaintif kepada defendan.

[3] As stated above, the learned senior assistant registrar having disallowed prayer 1 of the said summons in chambers (encl 8) however had granted the alternative prayers namely prayer 2 (a), (b) and (c) of the said summons in chambers. The plaintiff who was dissatisfied with the order of the learned senior assistant registrar which had allowed prayer 2 (a), (b) and (c) of the said summons in chambers has appealed to the judge in chambers (encl 23) to set aside the said order which was given on 14 November 2006.

[4] The plaintiff's claim against the defendant as per the statement of claim dated 14 June 2006, inter alia, and briefly is as follows:

(a) by a sale and purchase agreement dated 5 July 2005 (hereinafter referred to as 'the agreement') made between the plaintiff and the defendant, the plaintiff had agreed to sell and the defendant had agreed to purchase the industrial lands at Kinta Free Trade Zone, Chemor for the sum of RM1,328,928.48. The said agreement was conditional upon the fulfillment of certain condition precedent namely:

(i) the plaintiff is to obtain the consent of the Foreign Investment Committee (FIC) as well as the state authority under s 433B of the National Land Code 1965.

(ii) To obtain the consent of the Menteri Besar as endorsed on the title.

(iii) The condition precedent shall be fulfilled within six (6) months from the date of the agreement.

(iv) *Vacant possession of the said lands shall be delivered to the defendant by the plaintiff within five (5) working days of the defendant making full payment of the balance purchase price*.

(v) The defendant had in fact paid a deposit of 10% to the plaintiff's solicitor as stakeholder and the same shall be released to the plaintiff once the condition precedent are fulfilled whereupon the said agreement would also become unconditional.

(vi) The balance purchase price shall be payable two (2) months from the date of the said agreement becoming unconditional.

[5] The plaintiff had further pleaded in the statement of claim that:

(i) On or about early December 2005, while awaiting for the consent of the Menteri Besar, the defendant had illegally trespassed into the said lands and had unlawfully and without obtaining the plaintiff's consent proceeded to erect steel structures with the view for constructing a factory on the said lands.

(ii) The plaintiff's solicitor on 22 December 2005 had written to the defendant's solicitor expressing the plaintiff's shock and surprise to find out that the defendant had not only trespassed to the said land but also had proceeded to erect steel structures thereon and required the defendant to immediately acknowledge full responsibility for the trespass as well as to keep the plaintiff indemnified for the construction of the steel structures and also to pay a rental of RM20,000 per month for the use and occupation of the said lands from the date of the occupation until the date of the payment of the balance purchase price. The plaintiff had also asked from the defendant an indemnity to reimburse the plaintiff for any breach of building by laws and legislation arising from the structures erected by the defendant on the said lands.

[6] In other words, the plaintiff had not delivered the vacant possession of the said lands to the defendant when the defendant was alleged to have entered into the said land as the condition precedent had not been fulfilled and the balance purchase price had not been paid.

[7] As a result of the alleged trespass by the defendant, the plaintiff has claimed for the following:

(i) payment by the defendant of RM20,000 per month as rental or such reasonable or suitable sum from the date of occupation of the said land till the date of payment of the balance purchase price;

(ii) General damages for breach of covenants as contained in the said agreement and/or;

(iii) An indemnity to reimburse all financial liability incurred by the plaintiff for any breach of any building by-laws and legislation arising from the construction of the structures/factory on the said lands;

(iv) Costs; and

(v) Any other relief as the court deems and appropriate.

[8] By *statement of defence* dated 2 August 2006, the defendant had pleaded, inter alia, as follows:

(i) that the defendant at all material time was ready to pay the balance purchase price.

(ii) that there is no existing agreement between the plaintiff and the defendant to rent out the land nor is there any rental fees proposed by the plaintiff.

(iii) that the defendant at all material time did not occupy the said lands nor rented the said lands from the plaintiff.

(iv) The plaintiff's claims are scandalous, frivolous, and vexatious and tantamount to an abuse of the process of the court.

(v) The claims pleaded in para 20 of the plaintiff's statement of claim are premature and without any cause of action for the following reasons:

(a) there was no agreement for the tenancy of the said lands.

(b) the plaintiff did not prove that the defendant had breached the covenant of said agreement as well as the loss suffered by the plaintiff.

(c) as the defendant had already obtained the certificate of fitness for occupation of the factory constructed on the said land, it would establish that there is no breach committed by the defendant against building by laws or legislation arising from the construction of the said factory on the lands.

[9] By the affidavit in support (encl 9) of the summons in chambers (encl8) to strike out the plaintiff's statement of claim, the defendant had, inter alia, stated briefly as follows:

(i) *The defendant did not take vacant possession of the land but merely mobilised the building equipments on the said lands on the expectation that the said agreement would be completed within three (3) months from the date of the said agreement and thereafter to commence the construction thereof the soonest possible.*

(ii) The defendant did not rent the said lands from the plaintiff for any period of time prior to the completion of the said agreement. The alleged trespass onto the said lands by the defendant is denied and is yet to be proven by the plaintiff. Furthermore, an action based on trespass does not entitle the plaintiff to rental fees.

(iii) The plaintiff has no cause of action whatsoever for the claim of rental. In the alternative, the claim for rental of RM20,000 is scandalous, frivolous and vexatious.

(iv) Since the defendant did not commit any breach of the terms of the said agreement, the plaintiff had no way to prove damages suffered and the claim for damages is said to be wrongful and premature.

[10] By an affidavit in reply (encl 11) dated 5 September 2006; the plaintiff, inter alia, has stated that:

(i) In law, any occupation of land without authority would amount to trespass.

(ii) In this case, the very fact that the defendant had mobilised building equipments on the said lands was clearly an unauthorised entry.

(iii) While conceding that there was no tenancy agreement executed for payment of rent by the plaintiff and defendant, *the defendant had in fact admitted that they had occupied the said lands without authority and that tantamount to trespass and thus, there is no need for the plaintiff to prove damages in order to succeed in claim for trespass*.

(iv) One of the methods of compensation payable to the plaintiff is on the basis of fair rent that would be payable for the said land.

(v) The defendant is estopped from denying trespass or unauthorised entry as they have admitted mobilising building equipments on the said lands.

(vi) *As there was unauthorised entry and occupation by the defendant, the plaintiff is entitled for damages to trespass and it is the plaintiff's claim that this should be computed on the basis of fair rental payable for the use of the said lands*.

(vii) Contrary to the defendant's allegation that the plaintiff's claim is scandalous, vexatious or frivolous and an abuse of the process of the court, the plaintiff not only has a cause of action but indeed a claim for substantial damages for trespass and that the plaintiff's claim has been established by the defendant's own admission.

(viii) The plaintiff therefore prays that the defendant's application (encl 8) be struck off with costs.

(Emphasis added.)

[11] By an affidavit in reply (encl 12) dated 27 September 2006, the defendant, inter alia, has stated that:

(i) The defendant has reasonable expectation that the consent of the Menteri Besar shall be obtained within a period of there months.

(ii) Certificate of fitness has already been procured.

(iii) The defendant did not take vacant possession of the said lands.

(iv) The statements contained as referred in paras 9–11 of the plaintiff's afidavit *balasan* (encl 11) are equivocal, unclear and lacking in precision.

(v) The plaintiff cannot claim for rental fees for the said lands.

(vi) The defendant did not in any way breach the said agreement.

(vii) The plaintiff's writ summons and statement of claim, or in the alternative, the plaintiff's prayers in para 20(i), (ii) and/or (iii) ought to be struck out.

[12] On 19 February 2008 when the appeal was heard before this court, learned counsel for the plaintiff, inter alia, had submitted as follows:

(i) The plaintiff's action is founded on trespass. The defendant had entered into the said lands and it was trespass. Although the defendant had denied trespass, they have admitted intrusion and occupation of the plaintiff's land prior to the completion of the said agreement.

(ii) There is evidence of construction works. There was unlawful occupation at that point of time and the defendant had constructed building operation. There is no reason why the plaintiff cannot endorse the prayers as in para 20(i), (ii) and (iii) of the statement of claim and it is for the plaintiff to prove and for the court to decide on the claims.

(iii) Rental can also be referred to mesne profits as means of damages when trespass has taken place.

(iv) At the point of time, approval was not given and the plaintiff was not informed by the defendant since the defendant said that they have obtained the approval.

(v) The learned senior assistant registrar was wrong to strike out the prayers in para 20 (i), (ii) and (iii) of the statement of claim under O 18 r 19 (b), (c) and (d).

(vi) The appeal ought to be allowed and the order of the senior assistant registrar be reversed.

[13] On the other hand, learned counsel for the defendant has submitted, inter alia, and also by way of skeletal submission which is as follows:

(i) The plaintiff did not plead a material fact to form a cause of action.

(ii) There is no issue of trespass as the plaintiff had already stated that they are agreeable to the defendant occupying the land subject to payment of rental. The plaintiff's cause of action is for illegal trespass but they are claiming for rental and as such, there is a contradiction.

(iii) Conceded that damages have to be assessed and proved later at the trial.

(iv) There is no clause in the said agreement which stated that the defendant cannot occupy the lands before the completion date and this is not pleaded.

(v) There is no sufficient materials pleaded in the statement of claim and the prayers sought are not sufficiently pleaded.

(vi) The plaintiff did not plead in their statement of claim that the defendant had breached the covenant of the said agreement.

(vii) There is no reason stated by the plaintiff for claiming an indemnity. Furthermore, the defendant had successfully obtained the certificate of fitness from the authority.

(viii) In view of the above reasons, the defendant reiterated that the statement of claim ought to be struck out.

[14] On the other hand, learned counsel for the plaintiff, inter alia, had replied as follows:

(i) Prayer (iii) of para 20 of the statement of claim is withdrawn as at the time, the plaintiff was not aware that the approval was given as the plaintiff was not informed of the same.

(ii) The plaintiff would prove their claim at the trial. The breach of the agreement is the trespass as the defendant had moved into the land prior to the plaintiff having granted vacant possession.

DECISION

[15] In the instant case, the learned senior assistant registrar having dismissed prayer 1 of the defendant's application (encl 8) under O 18 r 19(a), (b) and (d), in other words, having found that there is a cause of action for the plaintiff to proceed to trial, had allowed the alternative prayer by striking out the reliefs prayed in para 20(i), (ii) and (iii) of the statement of claim, namely:

(i) *for the payment by the defendant of rental at RM20,000 or such reasonable sum a month from the date of occupation of the said lands to the date of payment of the balance purchase price*;

(ii) *general damages for breach of covenant(s) of the said Agreement*; dan/atau

(iii) *an indemnity to reimburse all financial liability incurred by the plaintiff for any breach of any building by-laws and legislation arising from the construction of the structures/factory on the said lands.*

[16] This court has no reason to disagree with the submission of learned counsel for the plaintiff that the reliefs claimed in para 20(i), (ii) and (iii) of the statement of claim are matters to be proved and determined at the trial

A and not by way of summary procedure or to be disposed off summarily as it is for the plaintiff to establish those claims at the trial and the plaintiff ought not to be shut out from adducing evidence to establish those claims. It is trite law that a plaintiff is not to be 'driven from the judgment seat' per Fletcher Moulton LJ in *Dyson v Attorney-General* [1911] 1 KB 410 at p 419. In B *Harrison v Bottenheim* (1878) 26 WR 362, Bramwell LJ at p 363 said:

> … it seems to me that there is at least a strong prima facie case for the interrogatories, discovery and cross-examination which will be available if the case goes to trial, but which will be shut out if there is summary judgment.

C

[17] On the face of the pleadings and the reliefs claimed, this court is satisfied that the reliefs claimed are not matters which are obviously unsustainable or the claim is plainly or evidently unjust in law or a sham or has no substance for the same to be struck out or to be decided summarily. D Since the learned senior assistant registrar had dismissed the defendant's application to strike out the plaintiff's writ of summons and statement of claim, the plaintiff's claim under the reliefs prayed in para 20(i), (ii) and (iii) of the statement of claim should therefore be set down for hearing however slight the chances are of succeeding (see *Saripah bte Manap & Ors v Emar Sdn* E *Bhd (In Dissolution) & Ors* [1998] 1 MLJ 323, *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688).

[18] Summary process is inappropriate where the facts and the issues raised F are in dispute and ought to be determined through cross-examination of witnesses (see *Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors* [2002] 6 MLJ 20) or it requires serious argument (see *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215, *Pacific Internet Ltd v Catcha.Com Pte Ltd* [2000] 3 SLR 26.) Fletcher Moulton LJ in *Dyson v Attorney General* [1911] 1 KB 410 at G p 419 said: '… difference of law, just as difference of facts, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers …'.

In *Nagle v Feilden* [1966] 2 QB 633 at p 648:

H

> It is only in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court and unarguable, that the summary remedy will be applied. (Per Danckwerts and Salmon LJJ).
>
> The summary remedy which has been applied to this action is one which is only I to be applied in plain and obvious case, when the action is one which cannot succeed or is in some way an abuse of the process of the court. (Per Danckwerts LJ) (see *Lim Kit Siang v Pemangku Ketua Polis Daerah Butterworth & Ors* [1988] 2 MLJ 648).

[19] Pleading must be hopeless, baseless or without foundation in law or in equity or otherwise an abuse of the process of the court before it can be struck out (see *Wenlock v Moloney* [1965] 1 WLR 1238; *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498, *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417, *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607, *News Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226). Power to strike out pleading or any part of a pleading under O 18 r 19 of the Rules of the High Court 1980 is not mandatory but permissive and confers discretionary jurisdiction to be exercised (see *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors* [1990] 3 MLJ 231).

[20] In the instant case, the facts and the circumstances are such that this court, with respect, would be justified in interfering with the discretion exercised by the learned senior assistant registrar in striking out the reliefs claimed by the plaintiff as they are not hopeless or baseless or without foundation in law or equity or it is an abuse of the process of the court (see *Ward v James* [1966] 1 QB 273 at p 293; *Charles Osenton & Co v Johnston* [1942] AC 130 at p 148, *Hennell v Ranaboldo* [1963] 1 WLR 1391). Frivolous or vexatious pleading or statement is generally referred to as groundless action or pleadings with no prospect of success. It is often raised to embarrass or to annoy the adversary to the action (see *Attorney General of the Duchy of Lancaster v London & North Western Railway* [1892] 3 Ch 274, *Malayan Banking Bhd v Gan Kong Yam* [1972] 1 MLJ 32).

[21] Abuse of process of the court usually refers to a situation where the court's process is used for unlawful object or clearly frivolous and to put forward would be an abuse of the process of the court and is not the purpose intended to achieve justice (see *Castro v Murray* (1875) 10 LR Ex 213; *Hazama Corp v KMS Builders Sdn Bhd & 2 Ors* [2004] 2 AMR 62). In *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637, His Lordship Gopal Sri Ram JCA delivering the judgment of the Court of Appeal at pp 645–647 said:

> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v Doctor & Ors* [1997] 2 All ER 417).
>
> Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an

abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

This court dealt with the point fairly recently in the context of the tort of abuse of process. It was in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425. I there said (at p 434):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is, invoked, not for the genuine purpose of obtaining the relief claimed but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:

> In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's right or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.
>
> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.
>
> Sometime abuse can be shown by the very steps being taken in the courts. Take some instances from the law of libel. When a man sent a defamatory circular to seven different persons, and the party defamed brought seven different libel action against the same defendant, one for each publication, all were stayed, save one, Earle J saying:
>
> > [T]he plaintiff has not alleged that any purpose would be obtained by the course he has already adopted, beyond imposing the cost of litigation on the defendant.

See *Jones v Pritchard* [1849] 6 Dow & L 529 at p 530. Again, where a pamphlet contained two different passages, each defamatory of a man, he brought two separate action, one for each passage. He failed on the first. The second was stayed, Fry LJ saying: 'Such successive action … would be an abuse of the process of the court …'. See *Macdougall v Knight* (1980) 25 QBD 1 at p 10.

> At other times, the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in it self, then it is wrong known to the law.
>
> Abuse of process in the context of a step taken in the proceedings would, in my judgment, include the use of interlocutory relief as an instrument of oppression. The law provides for remedies, both interim and final, to a litigant to set right, or to prevent, some harm or injury that has been done or may be reasonably apprehended. It is plainly an abuse of the court's process where relief at law or in equity is used, not to remedy a genuine grievance, but as an instrument of oppression. There have been instances before our court here an interlocutory injunction has been found to have been used as an instrument of oppression. We have always intervened in such cases and set the matter right (see for example *Motor Sports International Ltd (Servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605, *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165).

However, this court is satisfied that the facts of the present case is not a case where the process of the court has been abused or the reliefs prayed for in para 20(i) and (ii) of the statement of claim is used not to remedy a genuine grievance or used as an instrument of oppression or is an abuse of legal machinery. Therefore, the plaintiff should be allowed to proceed to establish the reliefs at the trial as this is not a proper time or an application stage to consider the final submissions where the powers of the court is invoked to strike out the reliefs on the grounds, inter alia, that it is an abuse of the process of the court (see *CC Ng & Brothers Sdn Bhd v Government of the State of Pahang* [1985] 1 MLJ 347).

[22] The contention that the claim is weak and is not likely to succeed is also not a ground to strike out the reliefs (see *Moore v Lawson* (1915) 31 TLR 418, *Kemsley v Foot & Ors* [1951] 2 KB 34, *Hubbuck & Sons v Wilkinson Heywood & Clark Ltd* [1899] 1 QB 86 at p 91, *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36, *Drummond-Jackson v Bristish Medical Association* [1970] 1 WLR 688, *Willis v Earl Beauchamp* (1886) 11 PD 59).

[23] This court is of the respectful view that this is not a case where the plaintiff's claim or relief is devoid of merit or cannot possibly succeed or is a hopeless case or contains 'bold statement without any facts or evidence to support it' and which is doomed to fail (see *Willis v Earl Beauchamp* (1886) 11 PD 59). On the other hand, in some cases, the facts may be such that the

justice of the case demands that the plaintiff's claim be dismissed (see *Metropolitan Bank v Polley* [1855]) or to prevent the parties from being harassed and put to unnecessary expense by frivolous, vexatious or hopeless litigation (see *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 at p 942). The object of invoking O 18 r 19 of the RHC is 'to prevent parties from being harassed and put to expenses by frivolous, vexatious or hopeless litigation' and the defendant shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts (see *Riches v Director of Public Prosecution* [1973] 2 All ER 935 at p 942). Nevertheless, this court finds that this is not such a case which occupies time and waste of money or useless and time consuming from the point of view of the proper administration of justice before the inevitable result is attained. This court is also satisfied that this is not a case where the reliefs sought by the plaintiff is frivolous, vexatious or hopeless as the learned senior assistant registrar herself had dismissed the defendant's application to strike out the writ and statement of claim. Therefore, the contention on behalf of the defendant that the plaintiff has no cause of action or the reliefs claimed is frivolous, vexatious or is an abuse of the process of the court is premature and cannot be sustained on the facts. In other words, the learned senior assistant registrar had found that there was a reasonable cause of action for the plaintiff to proceed to trial where she had refused prayer 1 of the said application. Having found so, the learned senior assistant registrar on the fact of this case, with respect, cannot then proceed to strike out the reliefs prayed by the plaintiff as if the striking out of the reliefs is allowed to be sustained, it would tantamount to contradiction in terms.

[24] The defendant having admitted entering into the said lands by placing the building equipments without the prior consent of the plaintiff cannot contend that they have not taken vacant possession but merely mobilised the building equipments on the said lands and therefore it does not amount to trespass is misplaced in law and on the facts. The defendant is not permitted to approbate and reprobate and move the court to strike out the reliefs as prayed by the plaintiff in the statement of claim (see *S Singaram v Fong Peck Moi & Anor* [1976] 1 MLJ 237.) In *King's Tanglin Shopping Pte Ltd v Chee Kim Neo* [1991] 3 CLJ 1933, Chan Sek Keong J (presently the Attorney General of Singapore) at p 1935 said:

> In my view, however, the plaintiffs must succeed on trespass. *The tort of trespass to land consists in the act of (1)* entering upon land in the possession of the plaintiff, or (2) remaining on such land, or (3) placing or projecting any object upon it — in each case without lawful justification. See *Salmon & Heuston on The Law of Torts* (19th Ed) at p 46. The entry upon the land of the plaintiff is not confined to physical entry although it is the commonest type of trespass. In *Gregory v Piper* [1829] 9 B & C, it was said that 'If a single stone had been put against the wall

it would have been sufficient'. Discharging water upon another's land is also trespass: see authorities cited in *45 Hals Laws of England* (4th Ed) p 632 n 12.

(Emphasis added.)

Trespass need not be tangible. *Street on Torts* (7th Ed) at p 59, n 6 opines that to cause some foreign matter, perhaps anything having size or mass, including gases, flames, beams from searchlights and mirrors to enter or come into physical contact with the land of the plaintiff is a trespass. I agree with the opinion of the late Professor Street (see *Mohamed v Kunji Mohidin* [1966] 2 MLJ 24, *Senik v Hassan & Anor* [1963] MLJ 368 at p 370, *Binariang Communications Sdn Bhd v I&P Inderawasih Jaya Sdn Bhd* [2000] 3 MLJ 321).

Trespass is actionable per se without proof of damage.

[25] As to the insufficiency of facts in the statement of claim, it is elementary rule of pleading that when a state of facts is relied on; it is enough to allege it simply without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation (see *William v Wilcox & Anor* [1835–1842] All ER Rep 25 at p 27 and followed in *HSBC Bank Malaysia Bhd v Dominance Timber Industries Holdings Sdn Bhd & Ors* [2003] MLJU 307.) In any event, justice demands that the plaintiff should be allowed the opportunity of adducing evidence to prove the plaintiff's claim as sought by the prayers in para 20(i) and (ii) of the statement of claim since the learned senior assistant registrar had found that the plaintiff's statement of claim ought not to be struck out. The doors of the court cannot be unduly shut in the face of litigant unless their actions filed in court are actuated by malice (see *Greenhalgh v Mallard* [1947] 2 All ER 255). The basic principle is that the pleading must contain a statement in summary form of the material facts, but not the evidence by which they are to be proved and the court would allow latitude (see *In re the Estate of Lee Siew Kow, Decd; Gan Eng Neo (W) & 2 Ors v Yeo Siew Neo (W)* [1951] MLJ 224 at p 225; *Stuart v Gladstone* (1879) 10 Ch D 644). It is important to state at this stage that this court is not expressing any views upon the merits of the case as this is not a matter which this court is required to decide at this stage but to be determined at the trial. In *Jacobs v Booth's Distillery Co* (1901) 85 LT 262, Lord James of Hereford said:

We are not expressing any opinion whatever upon the merits of the case. It appears to me that there is a fair issue to be tried. On which side the chances of success are it is not for this House to determine, but thinking, as I do, that there is a fair issue to be tried by a competent tribunal …

[26] Finally, this court with respect, wish to state that the cases namely; (1) *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691, (2) *Adib bin*

Mokhtar & Ors v Jason Chan Chee Keong & Anor [1999] 2 MLJ 473; (3) *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1994] 3 MLJ 530; (4) *Syarikat Kemajuan Kuari (M) Sdn Bhd v Su bin Abdullah & Anor* [2003] 1 MLJ 401; (5) *Cheng Heng Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; (6) *United Malayan Banking Corporation Bhd v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 (FC); (7) *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1989] 3 MLJ 177; (8) *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] 1 MLJ 418; (9) *Hsu Seng v Chai Soi Fua* [1990] 1 MLJ 300 referred to and relied on by learned counsel for the defendant as contained in *ringkasan hujahan* (encl 26) are not directly relevant to the facts and circumstances in the instant case and are distinguishable and does not assist the defendant in their application (encl 8).

[27] In the light of the pleadings and the finding by the learned senior assistant registrar that the plaintiffs' writ and statement of claim ought not to be struck out, this court finds that it is not appropriate to strike out the reliefs prayed for by the plaintiff summarily (see *Goodson v Grierson* [1908] 1 KB 761; *Lee Nyan Choi v Voon Moon* [1979] 2 MLJ 28, *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resort Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309 at p 320). In any event and on the facts, this court finds that this is not a suitable case for the issues raised by both parties to be decided by affidavit evidence (see *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at p 217). In *The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 MLJ 554, His Lordship Gopal Sri Ram JCA delivering judgment for the Court of Appeal said:

> 'An application to strike out an action under O 18 r 19 of the rules of the High Court 1980 should not descend into a trial on affidavits. What the court is really concerned with is to determine whether the pleading discloses facts which merit a trial of the action.' And His Lordship had referred to the case of *Bandar Builders Sdn Bhd & ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 (see *Hashim Din v Sato Kogyo Co Ltd* [1987] CLJ 628 (Rep)).

[28] This court is also of the considered view that by allowing the reliefs as in para 20(i), and (ii) of the statement of claim to remain until the trial, it would not cause any hardship or injury to the defendant as it is still for the plaintiff to prove those reliefs as prayed.

[29] Accordingly, the appeal by the plaintiff is allowed and the order given by the learned senior assistant registrar on 14 November 2006 which had allowed prayers 2(a) and (b) of the summons in chambers (encl 8) is set aside. As conceded by learned counsel for the plaintiff, prayer (c) as in para 20(iii) of the statement of claim is allowed to be withdrawn and struck out.

The plaintiff is awarded costs of this appeal which is to be agreed or taxed and to be borne by the defendant.

Appeal allowed with costs.

Reported by M Sivabarathi